

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

BAVARIAN NORDIC A/S and
ANTON MAYR,

Plaintiffs,

v.

ACAMBIS INC. and
ACAMBIS PLC,

Defendants.

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C.A. No. 05-614-SLR

FILED UNDER SEAL —

***CONTAINS CONFIDENTIAL
INFORMATION SUBJECT TO
PROTECTIVE ORDER***

BAVARIAN NORDIC'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

Plaintiff Bavarian Nordic A/S hereby opposes Defendants Acambis plc and Acambis Inc.'s (collectively "Acambis") motion to strike (D.I. 136). On January 12, 2007, BN filed a reply brief in support of its motion for summary judgment on conversion (D.I. 133). BN submitted the declarations of Drs. Li Westerlund and Axel Spies in support of its reply brief. Acambis has moved to strike these declarations as "untimely and incompetent statements" D.I. 136 at 1. As explained below, each of these declarations complies with FED. R. CIV. PROC. 56(e) and neither should be stricken.

The declaration of Dr. Spies and, in part, the declaration of Dr. Westerlund concern the alleged existence of the Bavarian State Vaccine Institute ("Institute"). Among other things, these declarations were offered to rebut any allegation by Acambis that the Institute is in operation today. Acambis, however, points out that in its January 12 Opposition Brief, it acknowledges in a footnote that the Institute "ceased operation" in 1980's. D.I. 136 at 4-5, *citing* D.I. 122 at 6 n.3. Because the parties are apparently in agreement that the Institute no longer exists, it is unclear why Acambis has moved to strike these declarations. Indeed, even if these declarations

merely substantiate facts that Acambis has already acknowledged, that presents no basis for them to be stricken.

Furthermore, BN does not rely on either Dr. Westerlund's or Dr. Spies' declaration to prove ownership of the MVA-572 sample. BN's conversion claims against Acambis involve the ownership of a specific vial of MVA-572 that Prof. Mayr took from his freezer and forwarded to Dr. Moss at NIH strictly for research purposes. This specific sample of Prof. Mayr's MVA-572 was later converted by Acambis for its own commercial use. BN has offered ample evidence that Mayr created MVA-572 at the University of Munich and owns MVA-572 pursuant to the professorial privilege. Acambis has the burden of proving its own theory that the now-defunct Institute owns MVA-572 because Prof. Mayr supposedly created MVA-572 at the Institute, not at the University of Munich. Discovery in this case is closed and Acambis has offered no credible evidence that Mayr created MVA-572 while working at the Institute or that the Institute owns MVA-572. Striking these declarations would not remedy Acambis' failure of proof in that regard, and Acambis can offer no valid rationale for the court to take such action.

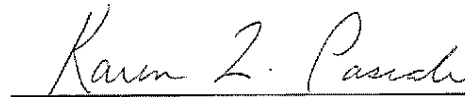
The remaining portion of Dr. Westerlund's declarations, paragraphs 2-4 are based on personal knowledge, not hearsay. For example, paragraph 2 concerns the fact that no one from the Institute has contacted BN or Prof. Mayr to assert any claims of ownership or intellectual property rights to any MVA strain. As Director of IP Rights for BN, Dr. Westerlund has personal knowledge of this issue. Additionally, it is BN's position that Acambis is the first company that has marketed and sold an MVA-based product. Westerlund Decl. at ¶ 3. Clearly, this position encompasses Dr. Westerlund's duties as Director of IP Rights at BN and meets the personal knowledge requirement of FED. R. CIV. PROC. 56(e). Moreover, it is unclear who else would be in a better position to make this assessment. Finally, paragraph 4 of Dr. Westerlund's

declaration reiterates facts that are already in evidence. As such, Acambis is wrong to suggest that Dr. Westerlund's declaration does not comply with FED. R. CIV. PROC. 56(e). All of these paragraphs comply with FED. R. CIV. PROC. 56(e), and accordingly they should not be stricken.

Respectfully submitted,

YOUNG CONAWAY STARGATT & TAYLOR, LLP

February 2, 2007



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CERTIFICATE OF SERVICE

I, Karen L. Pascale, Esquire, hereby certify that on February 15, 2007, I caused to be electronically filed a true and correct copy of the foregoing sealed document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on February 15, 2007, I caused a copy of the foregoing document to be served on the above-listed counsel and on the following non-registered participants in the manner indicated:

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